ABB DISTRIBUTION SDN BHD

v.

GKM DEVELOPMENT SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN JC
[SUIT NO: S2-22-620-1993]
7 NOVEMBER 1997

CONTRACT: *Formation - Concluded contract - Whether there was a concluded contract - Whether contract at negotiation stage - Existence of contract - Factors to be considered*

CONTRACT: *Guarantee - Banker's guarantee - Whether bank guarantee an essential term of contract - Whether guarantee condition precedent to formation of contract*

CONTRACT: *Breach - Whether there was breach of contract - Whether refusal to perform obligation constituted breach*

The defendants accepted by letter ('the letter') the plaintiff's offer to supply, install and commission a particular switchboard ('the switchboard') for a price of RM1,450,000. It was a term of the letter that the switchboard would be delivered within seven weeks after receipt of a clarified order and a banker's guarantee or letter of credit.

The letter also stated that the defendants were in the process of raising the bank guarantee and it requested the plaintiff to proceed with the order to ensure early delivery. As such the plaintiff placed the order with its principal in Sweden. A month after receipt of the letter, the defendants sought to repudiate the agreement by another letter.

The defendants maintained that the plaintiff ought not to have placed the order until receipt of a clarified order or letter of credit or banker's guarantee, and thus contended that they were not informed that the plaintiff was proceeding with the order without the banker's guarantee. The defendants contended that there was no concluded contract and that the matter was still in the negotiation stage.

The issue before the court was whether they was a concluded contract for the supply, installation and commissioning of the switchboard.

Held:

[1] Where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement (*Lau Sieng Nguong v. Hap Shing Co Ltd*). It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties (*Charles Grenier S/B v. Lau Wing Hong.)*

[1a] Based on the correspondence exchanged between the plaintiff and the defendants, a binding and concluded contract had been made. The terms essential to the contract had been agreed upon, namely the price, the delivery and the payment. There was nothing to indicate that there were further terms to be negotiated.

[2] The provision in respect of the bank guarantee was an essential term of the contract but it was **not** a condition precedent to the formation of the contract. It was a condition precedent to the delivery of the switchboard and not to the formation of the contract, because the plaintiff's letter of offer was varied by the defendants via their letter of acceptance which stipulated that the plaintiff was to proceed to order the switchboard due to the need to meet the delivery deadline and on the basis that the bank guarantee was being raised.

[3] The defendants had committed an anticipatory breach of contract as they refused to perform their obligation when it became due. A contracting party will not in normal circumstances be entitled to take advantage of his own breach against the innocent party. In all the circumstances, there was a concluded contract between the parties and which the defendant had breached.

[Judgment for the plaintiff.]

Cases referred to:

Alghussein Establishment v. Eton College [1988] 1 WLR 587 ***(foll)***

Associated Pan Malaysia Cement Sdn Bhd v. Sykt Teknikal & Kejuruteraan Sdn Bhd [1990] 2 CLJ 913 ***(foll)***

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 ***(foll)***

Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 ***(foll)***

Fercometal Sarl v. Mediterranean Shipping Co [1989] 2 All ER 742 ***(refd)***

Finmark Consultants Pte Ltd v. D & C Bank Bhd [1994] 3 CLJ 159 ***(foll)***

Industrial & Agricultural Sdn Bhd v. Golden Sands Sdn Bhd [1993] 4 CLJ 140 ***(foll)***

Lau Sieng Nguong v. Hap Shing Co Ltd [1969] 2 MLJ 190 ***(foll)***

Trans Trust SPRL v. Danubian Trading Co Ltd [1952] 1 All ER 970 ***(aff)***

For the plaintiff - CM Chew (Benjamin Yen with him); M/s Liza Chan & Co
For the defendants - Sri Dev Nair (HK Gill with him); M/s Hardarshan Kaur Gill & Co

Reported by Anitha Rajaram

JUDGMENT

RK Nathan JC:

Facts

By a letter dated 1 June 1993 the defendants accepted the plaintiff's offer to supply, install and commission a 11KV 40KA switchboard (the switchboard) for RM1,450,000 (the price). The price excluded all custom duties and sales tax and the defendants were to arrange for customs clearance of the switchboard. It was a term of the said letter that the switchboard would be delivered within seven weeks after receipt of a clarified order and banker's guarantee/letter of credit. As this letter dated 1 June 1993 would play a pivotal role in deciding this case it is necessary to reproduce the same:

> Our ref: KA/B803/GEN/TSG/072
>
> 1st June 1993
>
> M/s ABB Distribution Sdn Bhd
> Lot 4 Lorong Enggang 37
> Ulu Kelang Industrial Estate
> 50732 KUALA LUMPUR
>
> **Attn: Mr. Low Choon Huat**
>
> Dear Sir
>
> **30MW GAS TURBINE PROJECT CONTRACT NO. 18/93/11D2**
> **PACKAGE D2 - 2 UNITS AT KAPAR POWER STATION (PHASE 4 AREA) 11 KV 40 KA SWITCHBOARD**
>
> We thank you for your quotation for the 11 KV, 40KA switchboard in accordance with our single-line diagram No. GT30-D2-MB-Y001 (Rev A) in respect of the above project as per your fax dated 20th May 1993 to Mr T S Gill and fax dated 26th May 1993 to us.
>
> We are pleased to confirm acceptance of your offer to supply, install and commission the above 11 KV switchboard at RM1,450,000.00. The delivery permit of 7 weeks is noted.
>
> We are in the process of raising the Bank Guarantee and in the meantime would appreciate if you could proceed with the order to ensure early delivery of the equipment.

Our Consultant, Mr T S Gill of M/s Baitek Professionals Sdn Bhd would finalise all technical details with you.

Thank you.

Yours faithfully
GKM DEVELOPMENT BHD-KONTEK ABADI SDN BHD, JV

Sgd.
...
P MARID SINGH
Authorised Signatory

The plaintiff thus proceeded to order the switchboard from its principal in Sweden upon the defendants' acceptance of the plaintiff's offer and relying on the defendants' representation that they were in the process of raising the bank guarantee, as stated in the said letter. The defendants however by their letter dated 9 July 1993 repudiated the agreement by notifying the plaintiff of their intention not to proceed with the purchase of the switchboard. The said letter is also reproduced:

July 9, 1993

Asea Brown Boveri
Lot 4, Lorong Enggang 37
Ulu Klang Industrial Estate
54200 Kuala Lumpur

Attn : Mr. Low Choon Huat
Managing Director

Dear Sir

30MW GAS TURBINE PROJECT (CONTRACT NO. 18/93/11D2)
PACKAGE D2-2 UNITS AT KAPAR POWER STATION (PHASE 2 AREA)
- 11 KV 40KA SWITCHBOARD

We refer to your letter dated June 8, 1993.

We wish to inform that we are unable to proceed further on the purchase of 11 KV for 40KA Switchboard from your company and consequently did not open up a bank guarantee or a Letter of Credit to pursue further on our intent to purchase.

We regret for any inconvenience caused and look forward to working with you in our future projects.

Thank you and best regards.

Yours sincerely
for GKM DEVELOPMENT BHD. KONTEK ABADI SDN. BHD. J.V.

Sgd.
...
P. Marid Singh
Authorised Signatory

The plaintiff did not accept the defendants' repudiation. The defendants however refused to complete the purchase of the said switchboard nor to take delivery of the same. Hence this action by the plaintiff whereby the plaintiff claims as follows:

(a) price of goods	RM1,450,000.00	
(b) custom duties and sales tax	149,814.64	
(c) freight/custom clearance expenses	1,968.99	
(d) warehousing cost/ storage charges	3,000.00	and is still continuing at RM1,500 per month
(e) cost in mitigation ie, advertising, etc.	5,000.00	
Total sum	RM1,609,783.63	

Case For The Defence

The defendants contend that on 20 and 26 May 1993, the plaintiff had sent its quotation to the defendants for the supply, installation and commission of the switchboard. They maintained that the terms and conditions of the plaintiff's quotation were that:

(1) The switchboard would be delivered seven weeks after the defendants send their clarified order and banker's guarantee/letter of credit to the plaintiff.

(2) 80% of the purchase price would be paid to the plaintiff after the switchboard was inspected at the plaintiff's factory.

(3) 20% of the purchase price would be paid after the installation of the switchboard.

On 1 June 1993 the defendants accepted the plaintiff's offer to supply, install and commission the switchboard for RM1,450,000. However, the defendants took into account and accepted the condition that the switchboard would only

be delivered after the plaintiff received the clarified order/banker's guarantee/ letter of credit from the defendants. Subsequently, the defendants informed the plaintiff that they were in the process of obtaining the banker's guarantee and asked the plaintiff whether it could proceed with the order of the switchboard. The defendants also informed the plaintiff that their consultant would liaise with the plaintiff on all the switchboard's technical details. On 2 June 1993 the plaintiff enquired of the defendants regarding the banker's guarantee and the shipping particulars relating to the shipment of the switchboard. It was the case of the defendants that the plaintiff had never informed the defendants that it had agreed to process the order of the switchboard without the banker's guarantee. It was also their case that there was no agreement between the plaintiff and the defendants and that the parties were still in the process of negotiations. In the circumstances, the defendants argued that they had not breached any agreement with the plaintiff and that any loss suffered by the plaintiff was due to its own conduct.

The Issue

From their respective submissions I find that the issue to be decided is whether there was any concluded contract between the plaintiff and the defendants for the supply, installation and commissioning of the switchboard.

The Evidence

I find that there is sufficient evidence to suggest the formation of a contract between the plaintiff and the defendants. PW1 who was responsible for negotiating the contract on behalf of the plaintiff for the supply of the switchboard stated that the plaintiff was invited by the defendants' consultant to submit its quotation for the supply, installation and commissioning of the switchboard. This evidence is clearly corroborated by DW1. PW1 also confirmed that the defendants had accepted the plaintiff's offer on the terms contained in the quotation dated 26 May 1993 by their letter dated 1 June 1993 save and except for the bank guarantee which was not provided for at that time. I find as a fact that within a day after receiving the defendants' letter of acceptance dated 1 June 1993, PW1 discussed the technical details for the switchboard with the defendants' consultant, Mr. T.S. Gill. I find that it was reasonable and acceptable for the plaintiff to proceed to order the switchboard on 3 June 1993 to ensure that the said switchboard would be delivered within the delivery deadline of seven weeks. The reason for ordering the switchboard without the bank guarantee was based on the defendants' representation that they were in the process of raising the bank guarantee. It was also the evidence of PW1 that since the defendants had entered into a contract with Tenaga Nasional for and on whose behalf the said switchboard

was to be utilised, the plaintiff was not worried about payment. What is certain is that the order was placed on 3 June 1993 and as evidenced by the bill of lading, it was shipped on 21 June 1993. I reject the defendants' submission that the acceptance of the switchboard was "subject to delivery which can be made only after receipt of a clarified order and a banker's guarantee/letter of credit". I find no evidence that the defendants were still in the process of negotiation with the plaintiff after they had accepted the plaintiff's offer. I also reject the defendants' argument that the standard conditions of sale were part of the plaintiff's quotation for the simple reason that the said sample standard conditions of sale were never annexed to nor referred to in the plaintiff's quotation. I accept PW1's evidence that the plaintiff's offer to supply the switchboard as contained in its quotation, superseded the standard conditions. I also find that the clarified order referred to by the defendants came in the form of the defendants' letter of acceptance dated 1 June 1993. I accept PW1's explanation that the clarified order either acts as an unconditional acceptance of the plaintiff's offer or enables any changes to the terms of their offer to be made by the defendants. It is clear that the only change to the terms of the plaintiff's offer as contained in the defendants' telecopier transmission dated 26 May 1993 is expressly set out in para. 3 of the defendants' letter of acceptance dated 1 June 1993 which reads:

> We are in the process of raising the Bank Guarantee and in the meanwhile would appreciate if you could proceed with the order to ensure early delivery of the equipment.

I have no hesitation in finding that the above quoted representation has put to an end the issue raised in this action. To my mind it was a clear directive to the plaintiff to order the switchboard. It does not tell the plaintiff not to order and deliver the switchboard until the banker's guarantee is received. Furthermore, the circumstances that support the existence of a legally binding agreement are the finalisation of the technical details of the switchboard by the defendants' consultant with the plaintiff, as soon as the defendants accepted the plaintiff's offer. In fact para. 3 of the defendants' consultant's letter dated 11 June 1993 to the defendants says:

> We have recommended that an order be placed with ABB who have confirmed delivery of seven weeks from date of order. We note that the order to M/s ABB was confirmed vide your letter dated 1 June 1993 and we are proceeding with finalisation of all technical issues with M/s ABB.

The Law

In *Lau Sieng Nguong v. Hap Shing Co Ltd* [1969] 2 MLJ 190 the then Federal Court held that where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement. Further in *Ayer Hitam Tin Dredging Malaysia Berhad v. Y.C. Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754 the then Supreme Court held that the existence of an agreement depends upon the intention of the parties, who must be *ad idem*. It may be inferred from the language used, the parties' conduct, having regard to the surrounding circumstances, and the object of the contract. The court will generally apply an objective or "the reasonable man" test. Very recently in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1996] 3 MLJ 327 the Court of Appeal held that it is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. It also went on to hold that the law leans in favour of upholding bargains and not in striking them down.

I have no hesitation in holding that based on the correspondence exchanged between the plaintiff and the defendants, a binding and concluded contract had been made. I find that the terms essential to the contract had been agreed upon, namely the price, the delivery and the payment. There is nothing to indicate that there were further terms to be negotiated. Neither is there anything to show that something additional was required to be performed before a binding contract existed.

Condition Precedent

In *Trans Trust S.P.R.L. v. Danubian Trading Co Ltd* [1952] 1 All ER 970 CA Denning LJ made a very pertinent and relevant observation of the buyer's obligation to provide credit. He said at p. 976:

> ... The ability of the seller to carry out the transaction is, therefore, dependent on the buyer's providing the letter of credit, and for this reason the seller stipulates that the credit should be provided at a specified time well in advance of the time for delivery of the goods.
>
> What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation "subject to the opening of a letter of credit" is rather like a stipulation "subject to contract". If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods.

On a similar vein I find that the provisions of providing the bank guarantee was an essential term of the contract but that it was **NOT** a condition precedent to the formation of the contract. I hold that it was a condition precedent to the **delivery** of the switchboard and not to the formation of the contract, because the plaintiff's letter of offer dated 26 May 1993 was varied by the defendants by way of their letter of acceptance dated 1 June 1993 by their stipulation that the plaintiff do proceed to order the switchboard due to the need to meet the delivery deadline and on the basis that the bank guarantee was being raised. Furthermore considering the voice of urgency as expressed by the defendants' own consultant in their letter dated 11 June 1993, I am constrained to hold that time was of the essence of this contract as it was necessary to meet the delivery deadline of seven weeks. This was why the plaintiff placed the order for the switchboard within two days after the defendants accepted the plaintiff's offer. I am fortified and strengthened in holding this view when I refer to *Associated Pan Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287 where the then Supreme Court held that whether or not time is of the essence of a contract must depend on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstances must be looked at.

In any event it is clear from the evidence of DW1 that he has no direct personal knowledge of what transpired between the plaintiff and the defendants and he was also never involved in the negotiation for the purchase of the switchboard from the plaintiff.

The conduct of the defendants, having expressly represented to the plaintiff that they were in the process of raising the bank guarantee and thus requesting the plaintiff to proceed with the order of the switchboard to ensure its early delivery, and now reneging on that said representation, must be looked at in the light of DW1's evidence. It is obvious that by 23 June 1993 the defendants had already decided to place an order for the switchboard with another supplier, namely LKH Switchgear Sdn Bhd (LKH) after they discovered that they could obtain the same at RM1.2 million from LKH. This is evident from LKH's letter, invoice and the defendants' payment voucher, all dated 23 June 1993 and the letter of credit dated 29 June 1993 in favour of LKH. In any event the defendants went ahead with the purchase of the switchboard from LKH in spite of their own consultant's letter dated 11 June 1993 wherein the said consultant had in no uncertain terms expressed the unsuitability of LKH's switchboard.

The blatant and bare-faced repudiation of the contract by the defendants must be faced with the stone-wall defence of estoppel. Parties who had consciously entered into a contract at arm's length must take the bouquets and the brickbats with equal candour. If the conduct of the defendants is given judicial approval it becomes a mockery to bargains willingly entered into and would be an open licence and precedent for any disgruntled contractee to an agreement to rescind the contract on frivolous and vexatious grounds. The majesty of the court must not be brought down to base levels. The conduct of the defendants herein is most unconscionable. No satisfactory explanation whatsoever was given by the defendants as to why they decided to wait until 9 July 1993 to inform the plaintiff of their intention not to purchase the plaintiff's switchboard which by that time, on the evidence before me, had been shipped and was due to arrive by 15 July 1993, thus meeting the agreed delivery deadline. The only conceivable reason I can gather is the saving of RM250,000.

In *Finmark Consultants Pte Ltd v. D&C Bank Bhd* [1994] 3 MLJ 192, the then Supreme Court quoted with approval a passage by Lord Ackner in *Fercometal Sarl v. Mediterranean Shipping Co* [1989] 2 All ER 742 at 751:

> When A wrongfully repudiates his contractual obligations in anticipation of the time for their performance, he presents the innocent party B with two choices. He may either affirm the contract by treating it as still in force or he may treat it as finally and conclusively discharged. There is no third choice ...

In the present case the plaintiff has elected to affirm the contract. I can find nothing wrong in that.

Anticipatory Breach

I also find based on the decision of *Industrial and Agricultural Sdn Bhd v. Golden Sands Sdn Bhd* [1993] 3 MLJ 433 that the defendants had committed an anticipatory breach of contract since they refused to perform their obligations when they became due.

Lastly, it is my judgment that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the innocent party. This hallowed principle was set by the House of Lords in *Alghussein Establishment v. Eton College* [1988] 1 WLR 587.

In all the circumstances and having read all the cases cited by both parties, I find that there was a concluded contract between the parties herein and that the defendants had breached the same. I therefore entered judgment for the plaintiff with costs and ordered that damages be assessed before the Deputy Registrar.